

AGREEMENT RESTRICTING USE OF LAND

This AGREEMENT is made and entered into this 27 day of August, 2002, by and between the **MAKAH TRIBAL COUNCIL** (the "Council"), the governing body of the Makah Indian Tribe under a constitution and bylaws approved by the Secretary of the Interior on May 16, 1936, whose address is P.O. Box 115, Neah Bay, Washington 98357, and the United States Department of the Interior, acting as a Natural Resource Trustee under the National Contingency Plan, 40 C.F.R. Part 300 through the Regional Director, Region 1, United States Fish and Wildlife Service ("Regional Director") and the National Oceanic Atmospheric Administration, also acting as Natural Resource Trustee under the National Contingency Plan, 40 C.F.R. Part 300 (collectively the "federal trustees").

PURPOSE AND INTENT. The purpose of this Agreement is to implement that portion of the Final Restoration Plan for the Tenyo Maru Oil Spill, dated April 4, 2000 ("Restoration Plan"), relating to marbled murrelet habitat protection. The Restoration Plan was developed jointly by the United States, the State of Washington and the Makah Indian Tribe ("Trustee Committee") as part of a consent decree in United States et al. v. Maruha Corp. et al., No. C94-1537 (W.D. Wash., December 23, 1994) which settled these parties' claims for natural resource damages arising out of the 1991 Tenyo Maru Oil Spill. The Tenyo Maru Oil Spill resulted in the death of marbled murrelets which are listed as threatened species under the federal Endangered Species Act. The Restoration Plan provides for expenditure of funds recovered under the consent decree to secure protection for known occupied marbled murrelet nesting habitat and/or nesting buffer and recruitment areas.

The Trustee Committee has determined that the Restricted Use Area ("Area"), hereinafter described, contains known occupied marbled murrelet nesting habitat and/or nesting habitat buffer areas and has decided to expend funds to secure long-term protection for this habitat. This Agreement is intended to protect the functional values of the marbled murrelet habitat within the Area, to regenerate suitable habitat, and to promote the conservation and restoration of marbled murrelet populations affected by the Tenyo Maru Oil Spill. It is the intent of the Committee to allow the Tribe the opportunity to participate in marbled murrelet management activities within the Area and to enable the Tribe to continue all other activities within the Area that are not inconsistent with the restoration of marbled murrelets and their habitat. It is understood that this Agreement involves no transfer of title.

AUTHORITY. The Council has the authority to enter into this Agreement pursuant Article VI, Section 1 (c) of the Makah Constitution, after finding that this Agreement furthers the governmental purpose of preserving and protecting marbled murrelet habitat and habitat buffer areas. The Regional Director has been delegated the authority to act as the natural resource trustee for the Department of the Interior for the Tenyo Maru Oil Spill; and the National Oceanic and Atmospheric Administration acts as trustee for resources under the trusteeship of the Secretary of Commerce. The federal trustees have been authorized by the Trustee Committee to enter into this Agreement on behalf of the Committee to further the purposes of securing the protection of known occupied marbled murrelet nesting habitat and/or nesting habitat buffer areas.

NOW, THEREFORE, for and in consideration of the mutual terms and provisions hereinafter set forth, it is hereby agreed as follows:

- A. **RESTRICTED USE AREA.** Land more particularly described in Exhibit A and the Record of Survey, filed in Clallam County, Washington on December 19, 2001 as Auditor's File Number 2001-1075688, containing 283 acres, more or less, and located on the Makah Indian Reservation, held by the United States in trust for the Makah Indian Tribe. For the purposes of this Agreement, this land shall constitute the Restricted Use Area ("Area").
- B. **COMPENSATION.** The Makah Indian Tribe shall received the sum of one million four hundred thousand dollars (\$1,400,000.00) in consideration of the terms and conditions contained herein.
- C. **RESERVED RIGHTS.** Subject to the limitations described below in D. PROHIBITED USES, the Makah Indian Tribe hereby reserves.
 - 1. Control of Disposition. Its powers under the Makah Constitution to sell, dispose of, lease or encumber the Area, provided that in such conveyances or dispositions of the property the Tribes expressly subjects the conveyance or disposition to the terms of this Agreement.
 - 2. Quiet Enjoyment. Its right to authorize persons to undertake or continue any activity or use of the Area not prohibited by this Agreement.
 - 3. Control of Access. Its right to prevent trespass and to control access by the general public. Nothing in this Agreement shall give or grant to the public a right to enter upon or to use the Area. Marbeled murrelet habitat surveys may be conducted on the property in coordination between the Tribe and the other Trustees and shall be consistent with Tribal and other applicable federal regulations.
 - 4. Recreational, Ceremonial and Subsistence Uses. The right to authorize Tribal members and other members of the public to engage in recreational, ceremonial or subsistence uses of the Area, including hunting, fishing and gathering, pursuant to all applicable federal and tribal laws, *provided*, that these activities do not compromise the protection and restoration marbled murrelets and/or their habitat.
 - 5. Removal of Downed Timber for Cultural, Ceremonial and Subsistence Purposes. The right to authorize members of the Tribe to remove timber that has fallen from natural causes for cultural, ceremonial and subsistence purposes but not for commercial sale. Any removal must be done in a manner that will not disturb marbled murrelets nor damage standing timber or snags within the Area or otherwise affect the value of the Area as marbled murrelet habitat.

6. Non-destructive Collection of Forest Products for Cultural, Ceremonial and Subsistence Purposes. The right to authorize members of the Tribe to engage in collection of forest products for cultural, ceremonial and subsistence purposes, which is not likely to injure or kill any tree in the Area or otherwise affect the value of the Area as marbled murrelet habitat.

D. **PROHIBITED USES.** The following activities and uses are expressly prohibited on the Area:

1. Timber Harvest. Removal, harvest, destruction or cutting of timber, except as provided in the Reserved Rights above or when necessary to facilitate the promotion of habitat for marbled murrelets.
2. Land Use Conversion. Conversion of the property to a non-forested condition, or to agricultural, commercial or industrial uses.
3. Dumping. Storage or dumping of refuse, wastes, sewage or other debris. Refuse from temporary hunting or fishing camps shall be stored in containers or secured in outbuilding.
4. Excavating. Excavating, or removing of topsoil, sand or gravel.
5. Hydrology. Changing the topography or surface hydrology or diverting or causing the diversion of surface or underground water into, within or out of the Area without prior written approval from the Secretary of the Interior.
6. Roads. Constructing or building any type of new roads, or areas covered by asphalt or concrete pavement, without prior written approval from the Secretary of the Interior.
7. Buildings. Constructing or placing dwellings or other structures on the Area, except for temporary camps.

E. **RIGHTS OF THE FEDERAL TRUSTEES.** The federal trustees shall have the following rights:

1. Access. The right of ingress and egress at all reasonable times with prior notice to the Tribe, and if necessary across other lands controlled or owned by the Tribe, for purposes of inspecting the property, making scientific studies, and monitoring and enforcement of this Agreement.
2. Monitoring. The right to monitor the condition of marbled murrelet habitats, population and behavior in the Area. The federal trustees will coordinate with the Tribe to ensure that the methods and timing of such activities do not violate the reserved rights of the Tribe.

3. **Enforcement.** The right to prevent any activity on or use of the Area that is inconsistent with the terms and conditions of this Agreement and to require the restoration of such areas or features of the Area that may be damaged by any intentional activity.

F. **AREA MANAGEMENT.** The Makah Tribal Council will be responsible for the day-to-day management of the Area and the exercise of all rights retained by the Tribe under this Agreement. The Tribe will report to the Regional Director any conditions or events that the Tribe is aware of which may adversely affect marbled murrelet habitat within the Area.

G. **VIOLATIONS AND REMEDIES.** If the Tribe fails to comply with any of the provisions of this Agreement, the federal trustees shall have any legal or equitable remedy provided by law and the right to require corrective action sufficient to abate such violation and restore the affected property of its previous condition. The Tribe agrees that any activity identified under D. PROHIBITED USES would cause irreparable harm to the Area for which damages would be inadequate. Nothing herein shall be construed to entitle the federal trustees to institute any enforcement proceedings against the Tribe for any changes to the Area due to causes beyond the Tribe's control, such as changes caused by wildfire, flood, storm, earthquake, tsunami or the unauthorized wrongful acts of third persons.

H. **TERM OF THE AGREEMENT.** This Agreement shall be effective for two hundred (200) years from the date it is approved by the Secretary of the Interior under 25 U.S.C. § 81, and the compensation in Section B. above is received by the Makah Indian Tribe. Approval by the Regional Director does not constitute approval required under 25 U.S.C. § 81, and nothing in this agreement commits the Department of the Interior to grant such approval.

I. Within 10 days of the effective date of this agreement, the Tribe will record this agreement with the property records in Clallam County, Washington. This agreement will also be recorded with the BIA Land Title and Records Office.

J. The only source of funds for the compensation described in Section B. above shall be the Tenyo Maru Restoration Fund. Nothing in this agreement shall be construed as obligating the United States, its officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

K. **NOTICES.** All notices or other communications contemplated by this Agreement shall be writing and addressed to:

For the Department of the Interior: **Regional Director**
U.S. Fish and Wildlife Service
Eastside Federal Complex
911 NE 11th Ave
Portland, Oregon 97232-4181

For the Makah Indian Tribe:

Chair, Makah Tribal Council
P.O. Box 115
Neah Bay, Washington 98357

MAKAH INDIAN TRIBE
MAKAH TRIBAL COUNCIL

ATTEST

By: Gordon M. Smith
Its Chair

James Blaylock-Rubale
Tribal Secretary

ACKNOWLEDGMENT

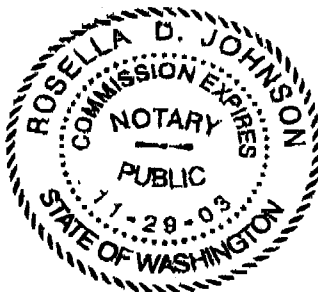
STATE OF Washington
COUNTY OF Clallam) :ss

On this 16 day of July, in the year 2002, before me, Rosella D. Johnson
Notary Public, personally appeared Gordon M. Smith
known to me to be the Chairman of the Makah Indian
Tribe that executed the within instrument and acknowledged to me that as such officer(s) to me that
(he)(she)(they) executed the same for and on behalf of said Tribe.

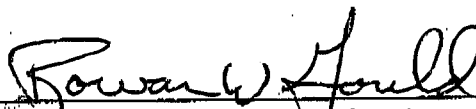
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day
and year first above written.

Rosella D. Johnson
Notary Public for Washington Residing at Neah Bay
My commission expires 11/29/03

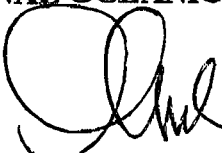
(SEAL)



DEPARTMENT OF THE INTERIOR

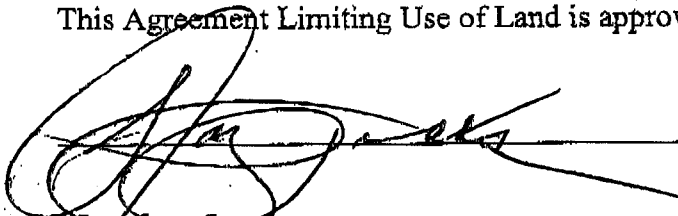
By: 
Regional Director, Region 1
United States Fish and Wildlife Service

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

By: 
Craig R. O'Connor
Deputy General Counsel

APPROVAL

This Agreement Limiting Use of Land is approved pursuant to the provisions of 25 U.S.C § 81.


Stanley Speaks,
Northwest Regional Director
BUREAU OF INDIAN AFFAIRS